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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

NEWMARKET MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit.

OPINIONS BELOW

The District Court's opinion (R. 49–54) is reported at 130 F. Supp. 706. The opinion of the Court of Appeals (Appendix, *infra*, pp. 6–18) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered May 18, 1956. (Appendix, *infra*, p. 19.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether a net operating loss sustained by a corporation resulting from a statutory merger may be

carried back and deducted from the income of the merged corporation under Sections 23 (s) and 122 of the Internal Revenue Code of 1939.

STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> (s) [as added by Sec. 211 (a), Revenue Act of 1939, c. 247, 53 Stat. 862] *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.
>
> * * * * *
>
> (26 U. S. C. 1952 ed., Sec. 23.)
>
> SEC. 122 [as added by Sec. 211 (b), Revenue Act of 1939, *supra,* and as amended by Sec. 215 (a), Revenue Act of 1950, c. 994, 64 Stat. 906]. NET OPERATING LOSS DEDUCTION.
>
> * * * * *
>
> (b) *Amount of Carry-Back and Carry-Over.*—
>
> (1) *Net operating loss carry-back.*—
>
> * * * * *
>
> (B) *Loss for Taxable Year Beginning After 1949.*—If for any taxable year beginning after December 31, 1949, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for the preceding taxable year.
>
> * * * * *

(26 U. S. C. 1952 ed., Sec. 122.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(14) *Taxpayer.*—The term "taxpayer" means any person subject to a tax imposed by this title.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3797.)

STATEMENT

The facts as stipulated (R. 10–14) and found by the District Court (R. 49–50) may be summarized as follows:

On September 26, 1951, Newmarket Manufacturing Company, a Massachusetts corporation, caused the organization of Newmarket Manufacturing Company, a Delaware corporation. On November 30, 1951, for *bona fide* purposes, in accordance with intercorporate articles of consolidation and an agreement of merger, and pursuant to the applicable statutes of Massachusets and Delaware, the Massachusetts corporation was consolidated with and merged into the Delaware corporation. (R. 49.)

The Delaware corporation acquired from the Massachusetts corporation all of its transferable assets and rights, and became liable for all the obligations of the Massachusetts corporation. The Delaware corporation had the same business as the Massachusetts corporation, the same officers, the same stockholders,

the same outstanding stock certificates. After the merger, the Massachusetts corporation ceased to exist as a separate corporation. (R. 49.)

During the taxable year ended with the date of merger, November 30, 1951, the operations of the Massachusetts corporation resulted in a federal income tax liability of $434,570.24, according to the tax return filed. The return of the Massachusetts corporation for this period was filed by the Delaware corporation, which paid the tax shown to be due, together with a subsequently asserted deficiency amounting, with interest, to $9,802.60. (R. 13.)

During the pre-merger taxable period from September 26, 1951, to November 30, 1951, the Delaware corporation carried on no business, and it accordingly reported no income for that period. (R. 11, 13.)

During the taxable year ended November 30, 1952, the Delaware corporation suffered losses resulting in a net operating loss available for carry-back or carry-over of $660,370.97. Operations for subsequent years also resulted in losses. (R. 13.)

In a timely claim for refund, the Delaware corporation asserted that its net operating loss for the taxable year following the merger could be carried back and deducted from the gross income of the Massachusetts corporation for the taxable year preceding the merger. (R. 5–8, 13–14.)

The claim for refund not having been allowed, this refund suit followed. (R. 14.) The District Court entered judgment in favor of the Government (R. 55), and the Court of Appeals reversed (Appendix, *infra*, pp. 6–18).

REASONS FOR GRANTING THE WRIT

The question in this case is similar to that presented in *Lisbon Shops, Inc.* v. *Koehler,* No. 64, October 1956 Term, in which the taxpayer's petition for a writ of certiorari was granted on June 4, 1956. In *Libson,* the issue is whether pre-merger net operating losses of merged corporations may be carried over and deducted from the post-merger income of the corporation resulting from the merger, while here it is whether a post-merger net operating loss of the resulting corporation may be carried back as an offset against the pre-merger income of the merged corporation. For the reasons pointed out in our petition for a writ of certiorari in *United States* v. *Koppers Co.,* filed at the same time, we believe it appropriate, for the protection of the Government's interests, to file a petition in this case. We respectfully suggest that disposition of this petition be held in abeyance pending the Court's decision in No. 64.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
LEE A. JACKSON,
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Attorneys.

JUNE 1956.

APPENDIX

United States Court of Appeals for the First Circuit

No. 5004

NEWMARKET MANUFACTURING COMPANY,
PLAINTIFF, APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[130 F. Supp. 706]

Before MAGRUDER, *Chief Judge, and* WOODBURY and HARTIGAN, *Circuit Judges*

Randolph E. Paul, with whom *Louis Eisenstein* was on brief, for appellant.

Joseph F. Goetten, Attorney, Department of Justice, with whom *H. Brian Holland,* Assistant Attorney General, *Lee A. Jackson* and *Harry Baum,* Attorneys, Department of Justice, *Anthony Julian,* United States Attorney, and *Arthur I. Weinberg,* Assistant U. S. Attorney, were on brief, for appellee.

OPINION OF THE COURT

May 18, 1956

MAGRUDER, *Chief Judge.* Newmarket Manufacturing Company, a Delaware corporation, brought suit against the United States in the United States District Court for the District of Massachusetts, seeking to recover an alleged overpayment of income taxes for the fiscal year ending November 30, 1951. Determi-

nation of the issue presented involves an interpretation and application of the so-called "carry-back" provision of § 122 of the Internal Revenue Code of 1939, as amended, whereunder a taxpayer is permitted in some circumstances to carry back a net operating loss of one fiscal year as a deduction against income earned in the preceding year. The district court, after trial without a jury, entered judgment dismissing the complaint. 130 F. Supp. 706. It seems to us that the district court committed error of law in this respect, and that plaintiff's appeal should succeed.

In 1944 Newmarket Mfg. Co., having been organized as a Massachusetts corporation, established a usual place of business in Lowell, Mass., and engaged in the business of weaving synthetic fibers.

On September 26, 1951, Newmarket Mfg. Co., the Massachusetts corporation, caused the organization under the laws of Delaware of a subsidiary of the same name. This Delaware corporation had an authorized capital stock of 450,000 shares with a par value of $2.50 each, and it issued 400 shares of its capital stock to the Massachusetts corporation for $1,000 cash. These 400 shares, which at that time were the only shares of the Delaware corporation outstanding, were later canceled on the date of the merger about to be described.

According to the Agreed Statement of Facts in this case—

> The sole purpose of Newmarket Massachusetts in causing the organization of Newmarket Delaware was to merge Newmarket Massachusetts with Newmarket Delaware, its wholly-owned subsidiary, in order to remove the taxpayer's corporate domicile from Massachusetts to Delaware and thereby avoid an application of the Massachusetts Corporate Franchise Tax with respect to sales made in New York State,